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CHARLES ELMORE GROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM—1945

No. 240

SOLLY WEISS,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT, AND BRIEF IN SUPPORT THEREOF**

WALTER BROWER,

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**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT**

*To the Honorable Chief Justice of the United States and
the Associate Justices of the Supreme Court of the
United States:*

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner, having been convicted for violations of Maximum Price Regulation 445 of the Office of Price Administration promulgated under the Stabilization Act of 1942, was sentenced under the Emergency Price Control Act of 1942 to imprisonment for six months and to pay a fine of \$25,000, \$5,000 on each of five counts of the information (fol. 383). Section 205 of the Emergency Price

Control Act of 1942 (50 U. S. C. A. App. 925(b)) prescribes a maximum fine of \$5,000 for each violation of any regulation promulgated pursuant to that Act. Section 11 of the Stabilization Act of 1942 (50 U. S. C. A. App. 971) prescribes a maximum fine of \$1,000 for violation of any regulation promulgated under that Act. The Stabilization Act continued the Emergency Price Control Act in effect except in so far as its provisions were inconsistent with the latter (50 U. S. C. A. App. 967).

Maximum Price Regulation 445 was promulgated by the Price Administrator under authority of Executive Orders 9250 and 9328 (50 U. S. C. A. App. pp. 314, 318). Each of these Executive Orders recites that it was issued by virtue of the authority vested in the President by the Constitution and the statutes and particularly by the Act of October 2, 1942 (The Stabilization Act) which amended the Emergency Price Control Act of 1942.

The Circuit Court of Appeals for the Second Circuit has held in this case that Maximum Price Regulation 445 was promulgated, at least in part, pursuant to the Emergency Price Control Act of 1942 and therefore the penalties of that Act and not those of the Stabilization Act of 1942 are applicable to violations of that Regulation. The basis of this conclusion is that otherwise the saving clause in the Stabilization Act of 1942 which continued in effect penalties prescribed by the Emergency Price Control Act of 1942 in so far as consistent with the Stabilization Act would have no meaning. The penalty provisions of the two acts are inconsistent. The Circuit Court of Appeals left unanswered the applicability of the new penalties created by Section 11 of the Stabilization Act of 1942. Under the Circuit Court of Appeals decision, Section 11 of the Stabilization Act of 1942 has no meaning.

This is a criminal action upon an Information filed against petitioner in the United States District Court for the Southern District of New York at the June Term, 1944,

charging him in thirteen counts with offering and agreeing to sell, and selling and delivering Scotch whiskey at prices in excess of those prescribed by Maximum Price Regulation 445 of the Price Administrator (fols. 4-35). The trial, by jury, held on November 1 and 2, 1944, resulted in a verdict of "Guilty" on all counts (fol. 358). Motions to dismiss the Information, for a directed verdict and to set aside the verdict were all denied and due exception taken (fols. 200-213, 300-308, 359-381). Petitioner was sentenced on November 15, 1944 to six months' imprisonment on Counts 1, 2, 3, 4, 5, 6, 7, 9, 11 and 12 of the Information, to run concurrently, and a fine of \$5,000 on five of these counts totalling \$25,000. Imposition of sentence was suspended on Counts 8, 10 and 13, and petitioner placed on probation for two years (fol. 283).

Petitioner appealed from the judgment to the Circuit Court of Appeals for the Second Circuit, which affirmed with an opinion (pp. 148-154). The questions on appeal were: (1) whether the fines imposed exceeded the legal maximum prescribed for the offenses charged; (2) whether there was a total failure of proof of an essential element of the offenses charged, to wit: the maximum price applicable to the alleged offers to sell and the sales attributed to petitioner and (3) whether petitioner's acts were violative of the statute under which he was accused. The opinion of the Circuit Court of Appeals did not mention the second question.

Counts 1, 4, 7, 9 and 11 of the Information charge that petitioner offered and agreed to sell certain whiskey at prices in excess of the legal maximum. Counts 2, 3, 5, 6, 8, 10, 12 and 13 charge that the petitioner sold and delivered the whiskey allegedly offered for sale. Delivery of the whiskey allegedly offered for sale was made in installments. Each installment was charged to be a separate sale, and was the subject of a separate count in the Information (fols. 4-35).

Petitioner, the sales manager for a wine company, acquainted with persons in the whiskey importing industry, met one Moret in New York in September, 1943 (fols. 227, 228, 44). Moret was in the wholesale beer, wine and liquor business in Atlanta, Georgia (fol. 42). Petitioner asked Moret if he were interested in buying Scotch whiskey (fol. 46). Upon receiving an affirmative answer, petitioner told Moret that he could get some for him, through Park Benziger & Company, whiskey importers (fols. 46, 105). He told Moret that he would have to pay Park Benziger & Company the ceiling price of \$11.82 a case, and pay petitioner \$13.68 a case for his trouble in putting him in touch with Park Benziger & Company (fols. 48, 105). Moret, the Government's witness, testified as follows:

“Q. In summary your understanding with Weiss was that if you would write Park Benziger & Company, Park Benziger & Company would sell you 500 cases of Scotch Whiskey and that you would pay Park Benziger for it and that you would pay Weiss for his trouble in putting you in touch with Park Benziger, is that right? A. Yes, sir” (fol. 105).

In accordance with petitioner's instructions Moret wrote to Park Benziger & Company, ordering 500 cases of whiskey, on September 20, 1943 (Gov. Ex. 1). Park Benziger & Company sent the whiskey to Moret in two installments of 250 cases each, together with its invoice at \$11.82 a case and sight draft which Moret paid (Gov. Exs. 2, 3, 4, 5). Petitioner had no connection whatever with Park Benziger & Company except as a friend of one of its employees (fols. 218-220). He at no time owned or controlled any of the whiskey sold to Moret by Park Benziger & Company (fols. 240-242). Moret paid petitioner \$6,804 for his services in getting this whiskey for him (fols. 67, 105). This transaction was the basis of the first three counts of the Information; the first charging petitioner with offering to sell 500 cases, the second with selling and delivering 250 cases of the allegedly offered whiskey, and the third with selling

and delivering the balance of 250 cases allegedly offered (fols. 5-11).

Identical transactions with Moret and with Waldorf Liquors, Inc. were the subjects of the remaining counts of the Information. The transactions with Waldorf Liquors, Inc. were of the same character as those with Moret, except that petitioner told one Schoenfeld of Waldorf Liquors, Inc. that International Distributors, Inc. would sell and deliver the whiskey to it. In respect of these transactions, Schoenfeld, the Government's witness, with whom petitioner had the transaction, testified as follows:

"Q. You had your dealings as to the whiskey with someone other than Weiss? A. The firm gave me the allocation.

"Q. The International Distributors delivered that whiskey? A. Yes.

"Q. The International Distributors charged you for that whiskey? A. Yes.

"Q. You paid the International Distributors for that whiskey? A. Yes.

"Q. The only thing that Weiss did was to use his influence so you could get it, is that correct? A. That is correct" (fols. 186, 188).

Petitioner had no connection whatever as employee, agent or servant of International Distributors, Inc. (fol. 224). He at no time owned or controlled any of the whiskey allegedly offered and sold by him to Waldorf Liquors, Inc. (fols. 218-220, 224, 240-242).

Although the maximum selling price under the Regulations to which Park Benziger & Company and International Distributors, Inc. were subject was stipulated to be \$11.82 a case, no proof of any maximum selling price applicable to offers to sell or sales by petitioner was given (fols. 171, 173).

The Circuit Court of Appeals held: (1) that the transactions between petitioner and Moret and Waldorf Liquors,

Inc., whereby petitioner agreed to get whiskey for them for a fee, was a contract to sell them whiskey; (2) that one need never have title in himself in order to transfer title to a buyer even though he is not the agent of the owner if he has "command" over the goods; (3) that Maximum Price Regulation 445 at least in part was promulgated pursuant to the Emergency Price Control Act of 1942 and that, therefore, the penalties of that Act and not those of the Stabilization Act of 1942 are applicable to violations of that Regulation.

Questions Presented:

1. Are the penalties prescribed by the Emergency Price Control Act of 1942 or the penalties prescribed by the Stabilization Act of 1942 applicable to violations of regulations promulgated at least in part under the authority of the latter Act?
2. Was it a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to affirm the instant judgment of conviction when there was a total failure of proof of any ceiling price prescribed by any regulation applicable to offers to sell, sales or deliveries of whiskey by petitioner?
3. Under the Emergency Price Control Act of 1942 or the Stabilization Act of 1942 can one be properly convicted of selling at prices in excess of the legal maximum goods of which he at no time was the owner or the agent of the owner?
4. Did the acts of petitioner constitute offers to sell, sales or deliveries of whiskey at prices in excess of the legal maximum under either of these Acts?

Reasons Relied Upon for Allowance of Writ

1. The great importance of the Emergency Price Control Act of 1942 and the effect of the Stabilization Act of 1942, amendatory thereof, to the United States, to the business world and legal profession, and the need of an authoritative opinion, particularly as to the conflicting penal provisions of these Acts, calls for a construction of the Acts by this Court.

2. The decision of said Circuit Court of Appeals holding that it is unnecessary for a seller, not the agent of the owner of goods, ever to have title to goods in order to transfer title to them, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The decision of said Circuit Court of Appeals, holding that there was evidence, from which the jury could find that petitioner was an offeror or seller of the whiskey in question, at prices in excess of any legal maximum, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, forthwith to certify and send to this Court a full and complete transcript of the records and proceedings of said Court had in the case numbered and entitled on its docket "No. 324, October Term 1944, United States of America, Appellee, against Solly Weiss, Appellant," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, that

the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated: July 16, 1945.

WALTER BROWER,

By JOHN W. BURKE, JR.,
Counsel for Petitioner.

